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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 982

SIGURD N. HERSLOFF and JOSEPH J. STERN, trustees on dissolution, pursuant to Section 8819 of the Compiled Laws of South Dakota, for the United States Asphalt Refining Company and Interocean Oil Company, dissolved corporations,

Petitioners,

against

THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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IN THE

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Petitioners,

against

THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

TO THE HONORABLE EARL WARREN, CHIEF JUSTICE OF THE UNITED STATES, AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners pray that a Writ of Certiorari issue to the United States Court of Claims for review of the judgment in the above-entitled action dated December 5, 1962, with order denying rehearing dated February 6, 1963 (Transcript p. 79).

Opinion and Findings of Fact

The Opinion of the United States Court of Claims (reported 310 F. 2d 947) is set forth in the Appendix on pages 18-27 and the Findings of Fact and Conclusion of Law on pages 27-43.

Jurisdiction

The statutory provision conferring jurisdiction on this Court may be found at 28 U.S.C. Section 1255.

Questions Presented

The surviving trustee on dissolution of two South Dakota corporations, United States Asphalt Refining Company (Asphalt), dissolved in 1928, wholly owned by Interocean Oil Company (Interocean), dissolved in 1937, received certain payments in the tax years in question, 1949, 1953 and 1954, from awards of the Mixed Claims Commission, United States and Germany, rendered in 1926 as damages for chartered ships sunk in World War I. The case involves corporate income taxes on such payments in those tax years. And under a 1953 agreement with Germany annual payments on the awards are to continue over a period of twenty-six years commencing in 1953.*

The payments were made to the trustee under a 1931 decree of the District of Columbia court which settled litigation over attorneys' fees for procuring the awards and directed that the attorneys should receive 21⅔% of sums to be paid on the awards and should have an equitable lien on the funds then held or which might thereafter be held by the Treasury for payment on the awards, and, for protection of the lien, provided the manner of payment to the corporations and the trustees, and perpetually enjoined

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* The granting of the awards, $150,000 and $447,000, respectively, plus interest, did not mean payment, as no funds had been provided (Finding 7(b), App. p. 32). The payments in 1949, 1953 and 1954 amounted to $34,000 (Finding 9, App. pp. 32-33), and the taxes assessed for those years for which this suit is brought amounted to $6,544.53 (Finding 25, App. p. 42). The payments received subsequent to 1954 have averaged about $14,000 a year, and the balance owing on the awards as at June 1, 1958, was a little over $400,000 (Finding 10, App. p. 33).

them from applying for or receiving payment otherwise than as provided in the decree. And in or before the year 1939 the trustees assigned certain additional percentages of the net balance to be received on the awards to other attorneys in payment for their legal services.

In the years in question, 1949, 1953 and 1954, the surviving trustee received payments on the awards and, after paying the percentages for such legal services and the trustees' commissions and expenses and reserving funds for possible liability for corporate income taxes, distributed the balances among the stockholders and filed fiduciary tax returns. There is no unresolved question of fact.

(a) Are such receipts on the awards, or any part thereof, in the years 1949, 1953 and 1954, twelve or more years after dissolution of the corporations, subject to corporate income tax?

(b) Does the fact that the surviving trustee on dissolution of the corporations continued in office to receive and distribute the payments on the awards, as required by the 1931 decree of the District of Columbia court for protection of the lien of the attorneys for their services in procuring the awards, including the payment of certain other percentages as legal fees incurred in or prior to 1939, the payment of the trustee's commissions and expenses, and the distribution of the balance among fairly numerous and changing stockholders, constitute the continuing conduct of corporate affairs so as to make such receipts subject to corporate income tax?

(c) Does the fact that during the years in question the trustee and counsel investigated a claim against Great Britain filed with the State Department in 1938, which the State Department advised had no merit, and the possible title to lands in the Dominican Republic, and in each case decided that the claim or title had no value, constitute such corporate action as to make such receipts on the 1926 awards subject to corporate income tax?

Statutes Involved

Internal Revenue Code of 1939, Sec. 52 a, and Reg. 111, Sec. 29.22 (a)-20, as to tax years 1949 and 1953 (App. pp. 55-56).

Internal Revenue Code of 1954, Sec. 6012 (b)(3), and Reg. Sec. 1.336-1, as to tax year 1954 (App. pp. 55-56).

Section 8819, 2 South Dakota Code (1919), as amended by Chapter 76, South Dakota Session Laws (1927) (Finding 2 (a), App. p. 28).

Reasons for Granting the Writ

(1) The Only Assets and Source of Income Were the 1926 Awards

This is established by the findings and conceded in the Opinion (Findings 9 and 11, App. pp. 32-34; Op. App. pp. 19-21; see extracts below).

(2) The Decision May Govern Taxability of Future Payments on the Awards to the Year 1979

The Court of Claims in its Opinion recognizes this, saying (App. p. 20):

> "In February 1953 the United States concluded with Germany a debt settlement agreement under which Germany was to make annual payments on such awards to a stated total sum over a 26-year period, commencing on April 1, 1953, and ending in 1979. This case involves income taxes paid by the trustees, on behalf of Asphalt and Interocean, on the interest on the original awards received in 1949, 1953 and 1954, *and it may well have an impact on the plaintiffs' tax liability for the succeeding years as well.*" (Emphasis added)

The issue presented by this case, therefore, is not necessarily limited to the payments on the awards in the years

in question here but may also apply to payments to be received in the succeeding years.

(3) The Stated Grounds for the Court's Decision

These consisted of the continuance in office of the statutory trustee pursuant to the injunction in the 1931 decree, discussed below at pages 8-10, and the following as stated in the Opinion (App. p. 24):

> "The record proves that the companies were far from wholly dormant; they had and claimed assets; they made some efforts to realize on their claims; they had certain debts; and they regularly distributed monies to attorney-creditors as well as to stockholders."

(4) There Were No Debts; No Creditors

The statement that the companies "had certain *debts;* and they regularly distributed monies to attorney-*creditors,*" (emphasis added) is pure assumption.* They had no debts. There were merely contingent fees payable as percentages of sums when, as and if received on the awards under the 1931 decree and under the assignments in 1939 to other attorneys who had rendered services. See the succeeding sentences in the Opinion describing the services (App. pp. 24-25):

> "In particular, from 1928 to 1958, the companies and the trustees received 29 separate payments on the awards of the Mixed Claims Commission; over the years since 1931 they made regular payments to lawyers who had served the companies prior to dissolution or thereafter; in the early 1930's they defended a suit by some of these attorneys for compensation; • • •. The other side of the coin is that the companies were not yet substantially debt-free—they owed monies to

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* As stated in *United States* v. *Causby*, 328 U. S. 256, 267, "deficiency in findings cannot be rectified by statements in the opinion."

> the attorneys who had represented them before the Mixed Claims Commission, to those who had served them in the fee-litigation with the earlier counsel, and to the attorneys who aided the trustees in the course of administration."

The payments were not *regular*, but irregular, only when payments were received on the awards.* Such attorneys' fees were not "debts" which would be shown as liabilities on a balance sheet, but percentage interests in the payments when, as and if received on the awards, assigned to the attorneys in payment for their services. See Finding 12(b) (App. p. 34) which states that under the 1931 decree "Colby and Brown should recover * * * 21⅔ percent of all sums thereafter to be paid on account of principal and interest on said awards * * *." And then Findings 13(a) and (b) (App. p. 36) which state that thereafter and on or prior to February 21, 1939, the trustees "assigned an interest of 1⅙ percent in said awards" to the attorneys "who represented them in the aforesaid litigation" and "assigned" to other attorneys certain other percentages "in payment for their legal services to the trustees."

These were "contingent fees," the *amounts undeterminable* except as portions of *future payments* on the awards.

But suppose there were creditors who must wait to be fully paid until completion of the payments on the awards, probably until 1979. Surely, even in such case, the receipt of payments in 1949, 1953 and 1954, *twelve to twenty-one or more years after dissolution, and ten or more years after the last attorney's services were rendered*, could not be deemed continuing corporate activity so as to subject them to corporate income taxes.

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* Payments were received by the trustees in the years 1928, 1929, 1931, 1941, 1947, 1949, 1953 and 1954 (Finding 9, App. p. 33).

Footnote 6 to the above-quoted statement from the Opinion, that one attorney claims Interocean owes him part of a fee for representing it before the Internal Revenue Service in a tax matter, and he is holding Interocean stock as security (App. p. 25), furnishes no support for the Court's assumption of the existence of debts. This is based on Finding 13(c) (App. p. 36), to the effect that about 1939 an attorney, Harvey Jacob, represented Interocean in a tax case and claims Interocean owes him for part of his fee and he is holding stock as security. The amount of the claim is not stated, or that it was ever presented to the trustees, or that any payment has ever been made on account of it, or that it has ever been recognized in any way whatsoever. It would long since have been barred by the statute of limitations. And the finding of such an undefined claim for legal services rendered in a tax case in 1939, subsequent to dissolution, cannot be deemed evidence of corporate activity in 1949, 1953 and 1954 to subject the payments on the awards in those years to corporate income taxes.

As for Jacob holding stock as security, according to Finding 13(c) the certificates were delivered to him in 1938, before his 1939 services were rendered, and the trustee's affidavit of May 26, 1938 (Def. Ex. 4, App. pp. 44-48), concerning the stock certificates held by him, evidently as custodian, makes no reference to any claim by him. Moreover, Jacob is one of the contingent fee attorneys (Finding 13(a), App. p. 36), receiving his percentage of each payment on the awards, without pressing this 1939 claim of unstated amount.

(5) The So-Called Claims to Other Possible Assets

Finding 17(a) (App. p. 38) states that when Interocean's charter expired in 1937 the potential assets consisted of the awards of the Mixed Claims Commission and three claims described in Findings 18, 19 and 20 under the headings, "British Claim," "Azua Property" and "Carteret Property."

Finding 18 (App. pp. 38-40) shows that the trustees never did have any valid claim against Great Britain. Although the claim was presented by Interocean to the United States Department of State in 1927, the State Department concluded that it had no merit. In 1938, however, Interocean pursued the matter by filing a claim with the State Department. In 1950 the trustee and his attorneys conferred with the State Department, and in 1951 the State Department by letter rejected it. There were further conferences in 1956 and 1958, subsequent to the tax years in question, but the Department continued to view the matter as without merit, and the claim was abandoned (Finding 18(e), App. p. 40).

As for the "Azua property" in Santo Domingo, all that happened in the years in question, as stated in Finding 19 (App. p. 40), was that investigation by counsel for the trustees in 1951 and 1952 revealed either that Interocean did not have title originally or that title had been lost through non-payment of taxes or through confiscation.

It is conceded that any interest in the Carteret property has no relevancy (Op. footnote 2, App. p. 22); through foreclosure by a mortgagee in an earlier year it yielded $650 (Finding 20, App. p. 41);

Surely there is no ground for holding that the so-called "investigations" (inquiries is all they were) by the trustee or counsel so many years after dissolution constituted corporate activities showing the dissolved companies "remained in existence" so as to warrant a corporate income tax on award payments having no relation to the inquiries which demonstrated an absence of other assets.

(6) The Continuance in Office of the Trustee on Dissolution

One reason for this was the method of payment prescribed by the 1931 decree approving the settlement of the litigation over the Colby and Brown fees for legal services in obtaining the awards. To assure payment of the 21⅔%

of future receipts on the awards, the decree directed the Secretary of the Treasury and the Treasurer of the United States to deliver all checks in payment of the awards only through The Riggs National Bank of Washington, D. C., for endorsement by the payees and disbursement by the Bank as provided in the decree, and to pay the remainder to Interocean, Asphalt, and the trustees after the Bank's reasonable compensation (Finding 12(c) and (d), App. p. 35). As provided in Finding 12(e) (App. p. 35):

> "The decree also provided that Interocean, Asphalt, and the trustees were perpetually enjoined from applying for, demanding of, or receiving from the United States or from any officer thereof any warrant, draft, check or order in payment of the awards or any part thereof, otherwise than as provided for in said decree."

In view of such injunction, the trustees (and the surviving trustee in the years in question) were required to continue in office to endorse the checks, receive the net payments from the Bank and make distribution to the other persons entitled to share, including payment of any corporate incomes taxes in the years in question, and to distribute the balance among more than twenty stockholders (Def. Ex. 5, App. p. 52), who, of course, were subject to change over the many years that these payments were to be made.

To eliminate any contention that the trustees represented anyone but the stockholders, in 1955 a request was made to the Treasury Department whether it would recognize an assignment of the right to future payments on the awards, but the Treasury Department was not satisfied that the statutory trustee had authority to pass on his duties, and it did not feel that it should undertake to determine the identity of the interested parties (Pltffs' Exs. 3 and 4, App. pp. 49-51).

But the South Dakota statute gives the answer. It provides (Finding 2(a), App. p. 28) that the trustees are "trustees of the creditors and stockholders." As there were no creditors in the years in question (other than the contingent fee attorneys, if they be classed as such), the surviving trustee was trustee only for the stockholders.* He was also a necessary agency for distribution of the net proceeds among this fairly numerous group and their successors.

Nevertheless, the Court of Claims attaches importance to such continuance in office of the statutory trustee pursuant to the decree, saying that: "the 1931 decree is simply a hard fact of these companies' corporate life which requires them to stay alive longer than they wish" (App. p. 25). In the present case, so many years after dissolution, the corporations had been fully liquidated to the extent feasible in view of the many persons entitled to distribution of the payments on the awards. Under these circumstances, for the Court of Claims to use the continuation in office of the trustee as a technical basis for assessing corporate income tax is a departure from the well-established rule that practical considerations are controlling in the field of federal income taxation. See the cases in which corporate income taxes were not imposed even though the corporations had not been formally dissolved or the corporate name was still being used in litigation: *Novo Trading Corp.* v. *Commissioner*, 113 F. 2d 320 (2d Cir., 1940); *Wier Long Leaf Lumber Co.* v. *Commissioner*, 173 F. 2d 549, 551 (5th Cir., 1949); and *Cold Metal Process Co.* v. *Commissioner*, 247 F. 2d 864 (6th Cir., 1957).

In *Cold Metal Process Co.* v. *Commissioner*, as stated by the Court of Claims in the present case (App. p. 27), "the remaining stockholder brought suit or maintained

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* Under similar statutes it has been held that, upon dissolution, title to the corporate assets vests in the stockholders, with power in the trustees, but not title. *Barker* v. *Edwards*, 259 F. 484, 488-489 (9th Cir., 1919); *Rossi* v. *Caire*, 174 Cal. 74, 161 Pac. 1161.

existing suits, *using the corporate name*, on claims arising out of predissolution activity; the court found, however, that these actions were solely for the benefit of the stockholder and not in the corporation's 'own right'." (Emphasis added.) In accord with this, in the present case the trustee, in receiving and distributing the payments, was acting for the stockholders.

(7) The Decisions Are Conflicting

Cases are now ranged on both sides of the question whether income which accrued and was received after dissolution from transactions or events prior to dissolution is subject to corporate income tax. Cases which say it is not taxable because the corporation is no longer in existence are the following:

Commissioner v. *Henry Hess Co.*, 210 F. 2d 553 (9th Cir., 1954);
Telephone Directory Advertising Co. v. *United States*, 142 F. Supp. 884 (Ct. Cl., 1956);
Cold Metal Process Co. v. *Commissioner*, 247 F. 2d 864 (6th Cir., 1957).

Cases which have held it taxable are the following:

O'Sullivan Rubber Co. v. *Commissioner*, 120 F. 2d 845 (2d Cir., 1941);
J. Ungar, Inc. v. *Commissioner*, 244 F. 2d 90 (2d Cir., 1957);
Hersloff v. *United States*, the present case (Ct. Cl., 1962).

The present case is directly in conflict with the much cited *Telephone Directory Advertising Co.* v. *United States*, 142 F. Supp. 884, also decided by the Court of Claims. In that case, the company and its directors and liquidating trustees in dissolution sued to recover corporate income taxes paid on commissions on advertising in telephone directories procured by that company and on a profit from the sale of assets by agents for its stockholders after dis-

solution. As for the commission income, plaintiffs contended that the corporation did not realize it because it had not accrued at October 31, 1950, the date of dissolution. The defendant contended that it was properly taxed because plaintiff earned the income before it dissolved. The Court of Claims held that it was not taxable income, saying (pp. 888-889):

> "Inasmuch as plaintiff did not have a fixed determined right to receive payment of a reasonably ascertainable amount on October 31, 1950, for the services that it had performed, the contractual right to receive payment upon the genuine condition that the directories remain outstanding represented unrealized income and was an asset distributed to the stockholders. We see nothing in the tax law that requires a corporation, which has employed an accrual method of accounting that properly reflected its income over a period of years, to remain in existence for the sole purpose of paying taxes after it is forced to discontinue business."

As for the sale of assets, the Court held that, since this was negotiated after the dissolution by agents for the stockholders, the profit was improperly included in the corporate income (p. 891).

The Court cited *Commissioner* v. *Henry Hess Co.*, 210 F. 2d 553 (9th Cir., 1954), saying (p. 889):

> "In the Hess case the Government requisitioned, on November 2, 1942, a vessel owned by the corporation without a determination as to value. On November 13, 1942, the corporation which was on an accrual basis, dissolved and distributed its claim for the undetermined value of the vessel to its stockholder which, itself, a few days later dissolved and distributed the claim to its stockholders. A dispute ensued as to the value of the vessel which was not settled

until in 1944. Partial payment was made in 1943 and final payment was made in 1944. The Commissioner sought to tax the profits on the sale to the corporation in 1942, 1943 and/or 1944. The court held for the taxpayers stating that the accrual of profits on the sale before liquidation was prevented because of the controversy as to value and that *no accrual could be made to the corporation after liquidation because the corporation was not in existence.* See also Novo Trading Corp. v. Commissioner, 2 Cir., 113 F. 2d 320; Motion Picture Corp. of Calif. v. Commissioner, 1942 P-H BTA-TC memo., Dec., para. 42,110; Lancaster v. Commissioner, 11 T.C.M. 1108." (Emphasis added.)

The Court of Claims recognized that its decision was in conflict with *J. Ungar, Inc.* v. *Commissioner*, which had just been decided by the Tax Court (26 T. C. 331) and was later affirmed by the second circuit Court of Appeals (see below), saying (p. 889):

> "Cf. J. Ungar, Inc. v. Commissioner, 26 T. C.—where the court held, under facts substantially similar to the instant case, that the income was taxable to the corporation because the corporation was still in the process of liquidation."

The Tax Court decision in *J. Ungar, Inc.* v. *Commissioner* was affirmed in 244 F. 2d 90 (2d Cir., 1957), so we have here a conceded conflict. In that case the corporation had been doing a commission business as agent for a Spanish exporter under an agreement that it should not be entitled to commissions until the goods were shipped. In October, 1951, Ungar, the sole stockholder, dissolved the corporation and took over the business individually, the corporation assigning to him all its assets except such cash as might be required for payment of liabilities. The only item in dispute was commissions *not accrued on the date of dissolution* but which were collected before the end of the corporation's fiscal year. The Court upheld cor-

porate income tax on such item. The Court first expressed doubt concerning such conclusion, citing (p. 92, footnote 2) *United States* v. *Cumberland Public Service Co.*, 338 U. S. 451; *United States* v. *Horschel*, 205 F. 2d 646; and *Telephone Directory Advertising Co.* v. *United States*, 142 F. Supp. 884. But, after setting forth an extract from the applicable Regulations, the Court concluded as follows (p. 93):

> "We cannot avoid reading this language as meaning that a corporation in process of liquidation is still in existence, if it retains assets to pay its debts, *or indeed to distribute among shareholders;* and that, where that is true, its return must include the period of the 'retention.'" (Emphasis added.)

In *Cold Metal Process Co.* v. *Commissioner*, 247 F. 2d 864 (6th Cir., 1957), above cited in the first group of cases, it was held that the absolute and unconditional assignment by the corporation of its income-producing property, together with a contingent right to income therefrom, payable, if at all, at some indefinite time in the future, in an indeterminate amount, did not amount to an anticipatory assignment of income which, when paid, became subject to corporate income tax. Nor was it subject to tax because litigation continued in the corporate name for several years. In its opinion the Court said that it "was not in agreement with the Commissioner's contention and the Tax Court's conclusion that even though it had dissolved in 1945 under the state law, it was still in existence in 1949 for Federal income tax purposes" (p. 873). The Court then quoted from the opinion of the Court of Claims in *Telephone Directory Advertising Co.*, 142 F. Supp. at page 889:

> "The plaintiff did not realize the income because it was not in existence when it accrued and was paid."

In *O'Sullivan Rubber Co.* v. *Commissioner*, 120 F. 2d 845 (2d Cir., 1941), above cited in the second group of

cases, the Court stated the facts initially as follows (p. 846):

> "In the disputed year petitioner was a dissolved corporation in process of liquidation. It sold its business of selling rubber heels and dissolved in 1932; since then it has not engaged in business, but has endeavored to liquidate as rapidly as possible. The original sales price, after defaults in payments, was reduced in 1935, and notes, bearing interest payable semi-annually and with serial maturities beginning in 1936, were taken for the unpaid balance of $340,000 due on the adjusted price."

In the year 1936, four years after dissolution, there were accruals of interest which were held to be subject to corporate income tax on the ground that the corporation was still in the process of liquidation.

As stated above, the decision of the Court of Claims in the present case conflicts with its own decision in *Telephone Directory Advertising Co.* v. *United States*. That case, as shown, involved the taxability of income earned before dissolution but which did not accrue and become payable until after dissolution, and profits from the sale of assets by agents for the stockholders and distribution among the stockholders, all within a few months after dissolution. In the present case, the tax was imposed on income from the awards which arose from the destruction of the corporations' chartered ships in 1918 and became payable and was received and distributed many years after dissolution. The factual difference on which the Court of Claims relies mainly was the continuance in office of the statutory trustee as the agency for distribution of the payments among the contingent fee attorneys and stockholders, as required by the 1931 decree (above p. 10). Such difference could not be deemed a distinction to bring the present case within the factual category of continuing corporate activity so as to subject the payments on the awards to corporate income taxes.

Conclusion

The decision of the Court of Claims is clearly erroneous. There was no question of fact or conflicting evidence on any issue. The findings are definite and unquestioned. The corporations had been dissolved twelve or more years before the tax years in question. Indisputably, the only assets in such tax years were the Mixed Claims Commission awards made in 1926. There never was any certainty of payment of the awards. The money had to be supplied by Germany. Even though the 1953 agreement provides that payments shall continue annually to 1979, there is still uncertainty for the funds are "not here" and many complications can arise to prevent the payments from coming here. There was no "collection" of assets but only passive receipt of payments when and as made on the awards. There were no creditors but only percentage interests in the awards and expenses of administration to be paid before distribution among the stockholders. The stockholders are relatively numerous, twenty or more, and subject to change, so that some agency was required to receive such payments and make distributions. The Court-appointed trustee on dissolution served that purpose, legally and practically.

If this erroneous decision, of which review is here sought, is allowed to stand, the stockholder-participants in the awards will suffer unjustified losses and may be seriously prejudiced in possible litigation with respect to corporate income taxes on payments to be received in subsequent years up to 1979.

The decision also confuses the Tax Law in cases involving income from payments accrued and received over years subsequent to dissolution of a corporation whose business operations have been completely terminated and such payments as received are distributed to its creditors and/or stockholders, whether through an agency such as a con-

tinuing trustee on dissolution, as in the present case, or otherwise (see conflicting decisions, p. 11). The decision may well have application to cases arising from the appropriation or confiscation of the assets and business of American corporations, followed by dissolution, for which compensation may take the form of long-term obligations with interest to accrue over many years for payment of creditors and stockholders.

Therefore, this petition for a Writ of Certiorari should be granted.

Dated: March 29, 1963.

Respectfully submitted,

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Counsel for Petitioners.

APPENDIX

Opinion of the United States Court of Claims.

IN THE UNITED STATES COURT OF CLAIMS

No. 126-58

(Decided December 5, 1962)

SIGURD N. HERSLOFF AND JOSEPH J. STERN, TRUSTEES ON DISSOLUTION, PURSUANT TO SECTION 8819 OF THE COMPILED LAWS OF SOUTH DAKOTA, FOR THE UNITED STATES ASPHALT REFINING COMPANY AND INTEROCEAN OIL COMPANY, DISSOLVED CORPORATIONS v. THE UNITED STATES

Herbert Plaut for the plaintiffs. *David C. Bastian* and *Charles E. Scribner* were on the briefs.

Conrad T. Hubner, Jr., with whom was *Assistant Attorney General Louis F. Oberdorfer*, for the defendant. *Edward S. Smith, Lyle M. Turner* and *Philip R. Miller* were on the brief.

OPINION

DAVIS, *Judge*, delivered the opinion of the court:

This refund suit concerns the status for income tax purposes, in 1949, 1953, and 1954, of two affiliated South Dakota corporations, United States Asphalt Refining Company and Interocean Oil Company, which had earlier been dissolved under the law of their incorporation. The plaintiffs' claim is that the two corporations were dead and buried in the taxable years, and therefore no longer subject to the federal income tax. The Government parries with the defense that the companies, though dissolved, were carrying on

sufficient activities, through their liquidating trustees, to be deemed still in existence.

Asphalt was dissolved by a South Dakota court in 1928; Interocean's charter expired in 1937. Under South Dakota law providing for "trustees of the creditors and stockholders" of a dissolved corporation, two of the then surviving directors of Asphalt became such trustees on its dissolution in 1928; on the dissolution in 1937 of Interocean (Asphalt's parent), the same men became the trustees of that corporation. Thereafter, by a series of orders of the South Dakota court, successor trustees were appointed on the death of earlier trustees, so that the present plaintiffs, Sigurd N. Hersloff and Joseph J. Stern, are now the duly appointed trustees empowered to sue on the present tax claims.

These claims have their seed in the days of World War I. During that conflict both Asphalt and Interocean chartered steamers which were lost at sea through the acts of Germany. In August 1926, before the dissolution of either company, the Mixed Claims Commission—which was set up to arbitrate claims for the destruction by Germany of American property in the First World War (see *Z. & F. Assets Realization Corp.* v. *Hull*, 311 U. S. 470 (1941)—made an award to both corporations for their lost vessels. The award to Asphalt was $150,000, with interest at 5 per cent from November 11, 1918, to the date of payment; Interocean's award was $447,000, with 5 per cent from August 13, 1916, to the date of payment. Under the arrangement between this country and the Weimar Republic, Germany was obligated to pay the amounts of such awards to the United States; but in 1926 no funds had as yet been provided for their satisfaction. Payments on the awards were authorized by the Settlement of War Claims Act of 1928, 45 Stat. 254, and under that Act and its amendments the Treasury, beginning in August 1928, made intermittent payments of principal and interest to the two corporations

and, after their respective dissolutions, to the trustees. In February 1953 the United States concluded with Germany a debt settlement agreement under which Germany was to make annual payments on such awards to a stated total sum over a 26-year period, commencing on April 1, 1953, and ending in 1979. This case involves income taxes paid by the trustees, on behalf of Asphalt and Interocean, on the interest on the original awards received in 1949, 1953, and 1954, and it may well have an impact on the plaintiffs' tax liability for the succeeding years as well.

During their long period of stewardship, the trustees have carried on certain activities and performed functions from which the parties draw differing conclusions. As the result of a suit for fees by the attorneys who represented Asphalt and Interocean before the Mixed Claims Commission, the District Court for the District of Columbia (then called the Supreme Court of the District) entered a compromise decree (in August 1931) which established the attorneys' right to recover from the corporations and the trustees a percentage of all amounts thereafter paid on the awards, with an equitable lien on all funds to be used for such payments. To enforce these rights, the decree, which was to bind all successors and all funds from which payments would be made, provided that the Treasury was to deliver payments on the awards to the companies and trustees only through the Riggs National Bank in Washington; that bank was to forward the check or warrant to its New York correspondent for endorsement by the payees (the trustees) and return it to Riggs to be cashed and disbursed as required by the decree, *i.e.*, a percentage to the attorneys and the rest to the companies and trustees (through a check to Interocean which would discharge payments due Interocean, Asphalt (Interocean's subsidiary), and the trustees). The corporations and trustees were also enjoined from seeking from the Treasury payment in any other manner. In or before 1939, the trustees assigned

various other portions of the payments on the awards to other attorneys who had rendered legal services to them. In the period before and including the taxable years involved here, the trustees received payment through the system set up by the 1931 decree—satisfying the bank fees, trustees' commissions, and sums due the various attorneys pursuant to the decree and assignments, and then paying over the balance to the stockholders of Interocean pro rata.

When Interocean's charter expired in 1937, it had certain potential assets, two of which are now relevant.[1] The so-called "British claim" was against the British Government, which had requisitioned two tankers from Interocean in World War I, for paying charter hire at less than the market rate. In 1927, the State Department rejected the claim as invalid and refused to present it to Great Britain. Nevertheless, Interocean's attorneys persistently pressed it thereafter. A new claim was filed with the State Department in 1938 and actively pursued in the manner of such international claims. There were conferences in 1950, and the claim was again rejected in 1951. In 1956, Interocean's trustee referred the claim to a Washington attorney who investigated it and discussed it again with the State Department in March 1958. He reported to the general counsel for the trustees that the Department was willing to arbitrate the matter, but the general counsel decided to abandon it since previous arbitrations had held the rates paid by the British to be adequate. Another possible asset was the "Azua property", 15,000 acres of oil land and 150,000 acres of timberland, in the Dominican Republic: these appear to have been of little value, but the trustees made some efforts to realize on them; further investigation by the trustees' counsel in 1951 and 1952 revealed either that Interocean did not originally have title or that

[1] Asphalt had no assets, potential or actual, aside from the award by the Mixed Claims Commission.

it had been lost through non-payment of taxes or confiscation.[2]

On these facts we are to decide whether Interocean and Asphalt were subject to the corporate income tax in 1949, 1953, and 1954. That issue is to be determined by federal, not state, law. *Ochs* v. *United States*, Ct. Cl., Nos. 362-56, 364-56, decided July 18, 1962, slip op., p. 4, 305 F. 2d 844, 847.[3] The first two of the taxable years (1949, 1953) are governed by the Internal Revenue Code of 1939, the third (1954) by the 1954 Code. Both statutes (Sec. 52(a), 1939 Code; Sec. 6012(b)(3), 1954 Code) provide in substance that, where receivers, trustees in bankruptcy, or assignees hold or operate the property or business of the corporation, the receivers, trustees, or assignees shall make returns and pay taxes for the corporation in the same manner and form as are required of corporations.[4] The controlling regulations under the 1939 Code (Treas. Reg. 111, Sec. 29.22(a)-20, and Treas. Reg. 118, Sec. 39.22(a)-20) declared, under the heading "Gross income of corporation in liquidation," that on dissolution the "corporate existence is continued for the purpose of liquidating the assets and paying the debts, and such receiver or trustees [*i.e.*, receiver or trustees in dissolution] stand in the stead of the corporation for such purposes. • • • Any sales of property by them are to be treated as if made by the corporation for the purpose of ascertaining the gain or

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[2] Another asset, the "Carteret property" in New Jersey, is not now pertinent because it was finally disposed of in 1947, prior to the earliest taxable year (1949) in the present case.

[3] The South Dakota statute (see finding 2) provides that the trustees of the corporation on dissolution "have full power to settle its affairs, sell and convey its property, collect and pay the corporate debts, and divide among the stockholders and members the property, or the proceeds of the sale thereof, which remain after the payment of debts and necessary expenses."

[4] The differences in wording between the two Codes are not significant for the present case.

loss. * * *" The comparable regulation under the 1954 Code (Treas. Reg. on Income Tax, 1954 Code, Sec. 1.336-1, "General rule on liquidation of corporation") provides that "* * * gain or loss is recognized to a corporation on all sales by it, whether directly or indirectly (as through trustees or a receiver)"—with one exception not now relevant.

The cases under the 1939 Code and regulation hold that after dissolution the corporation-in-liquidation continues for federal income tax purposes as a taxable entity in those instances in which its affairs are substantially unsettled, it possesses, sells or seeks assets, or its liquidating agents carry on any substantial activities on its behalf.[5] As the Second Circuit put it in *O'Sullivan Rubber Co.* v. *Commissioner*, 120 F. 2d 845, 847 (1941), "the collection of assets, the payment of obligations, and other acts required to terminate its affairs and business" are "corporate purposes, contemplated as such from the birth of the corporation; the declining years of a corporation are part of its life; * * *." For tax purposes such liquidation by a receiver or a trustee-on-dissolution "is treated as a continuation of the corporate business." *J. Ungar Inc.* v. *Commissioner*, 244 F. 2d 90, 92 (C.A. 2, 1957); *Fairfield S. S.*

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[5] See *Taylor Oil & Gas Co.* v. *Commissioner*, 47 F. 2d 108, 109 (C.A. 5, 1931); *Burnet* v. *Lexington Ice & Coal Co.*, 62 F. 2d 906, 909 (C.A. 4, 1933); *Hellebush* v. *Commissioner*, 65 F. 2d 902, 903-04 (C.A. 6, 1933); *Northwest Utilities Securities Corp.* v. *Helvering*, 67 F. 2d 619, 621-22 (C.A. 8, 1933); *Whitney Realty Co.* v. *Commissioner*, 80 F. 2d 429, 430-31 (C.A. 6, 1935); *Tazewell Electric Light & Power Co.* v. *Strother*, 84 F. 2d 327, 328, 330 (C.A. 4, 1936); *First Nat. Bank of Greeley, Colo.* v. *United States*, 86 F. 2d 938, 941 (C.A. 10, 1936); *O'Sullivan Rubber Co.* v. *Commissioner*, 120 F. 2d 845, 847 (C.A. 2, 1941); *Fairfield S. S. Corp.* v. *Commissioner*, 157 F. 2d 321, 323 (C.A. 2, 1946), *cert. denied*, 329 U. S. 774; *J. Ungar Inc.* v. *Commissioner*, 244 F. 2d 90, 92 (C.A. 2, 1957); *Smith* v. *Commissioner*, 26 B.T.A. 1178, 1184-86 (1932); *Caswell* v. *Commissioner*, 36 B.T.A. 816, 823-24 (1937).

Corp v. *Commissioner*, 157 F. 2d 321, 323 (C.A. 2, 1946), *cert. denied*, 329 U.S. 774. In view of the similarity of the statutory provisions and regulations, the test under the 1954 Code must be the same. The necessary corollary under both Codes is that income received by the trustees during such a period of continued corporate existence must be reported as the corporation's income.

In the perspective of the entire history of the trustees' tenure as well as from the standpoint of their functioning during the taxable years, we must regard the activities of the plaintiffs (and their predecessors as trustees-on-dissolution), considered together with the status of the corporate affairs, as more than sufficient under the accepted test to show that the corporations remained in existence. The record proves that the companies were far from wholly dormant; they had and claimed assets; they made some efforts to realize on their claims; they had certain debts; and they regularly distributed monies to attorney-creditors as well as to stockholders. In particular, from 1928 to 1958, the companies and the trustees received 29 separate payments on the awards of the Mixed Claims Commission; over the years since 1931 they made regular payments to lawyers who had served the companies prior to dissolution or thereafter; in the early 1930's they defended a suit by some of these attorneys for compensation; they pursued the "British claim" on various occasions from 1927 to 1958, and similarly made intermittent attempts to obtain a return on the "Azua property" in the Dominican Republic until about 1952. (The trustees also obtained commissions for their activities.) The other side of the coin is that the companies were not yet substantially debt-free—they owed monies to the attorneys who had represented them before the Mixed Claims Commission, to those who had served them in the fee-litigation with the earlier counsel, and to the attorneys who aided the trustees in the

course of administration.[6] Most of this was specifically true of the companies in the particular taxable years (1949, 1953, and 1954); the only noteworthy exception is that in the latter two the Dominican Republic property had apparently been written off. Whatever the precise minimal standard for marking continued corporate existence for income tax purposes, the activities and condition of Asphalt and Interocean were measurably above the line in the years involved here.

The plaintiffs suggest that this standard should not be applied to Asphalt and Interocean because the 1931 decree ending the litigation with their attorneys forecloses the trustees from fully liquidating the companies and distributing all the remaining assets to the stockholders. We are far from convinced that the District Court could not be persuaded for good cause to alter the terms of its decree,[7] but in any event the 1931 decree is simply a hard fact of these companies' corporate life which requires them to stay alive longer than they wish. "The operation of a going concern is not a condition precedent to tax liability. Petitioner suggests no reason why its position should be held so anomalous that it does not fit into a framework in which business units of every description, of long or short duration, must share in the cost of society. This is the price of existence." *O'Sullivan Rubber Co.* v. *Commissioner*, *supra*, 129 F. 2d at 847.

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[6] One attorney claims Interocean owes him part of a fee for representing it before the Internal Revenue Service in a tax matter, and he is holding Interocean stock as security.

[7] Plaintiffs say that they requested the Treasury Department to recognize assignments of future payments to trustees for the stockholders, but the Treasury was unwilling to honor such an assignment, at least in the absence of consent by all interested parties. However, there is no showing of any effort to have the District Court change its decree; we do not read the injunctive provisions of that order as in any way prohibiting application for its modification.

Appendix.

We point out, finally, that the decisions plaintiffs cite, in which dissolved corporations were held no longer liable for income tax, did not concern a live corporate status or activities of the kind we have here, but rather companies which had been fully liquidated. In *Novo Trading Corp.* v. *Commissioner*, 113 F. 2d 320 (C.A. 2, 1940), all the corporate assets had been distributed to the stockholders, the company had paid all its debts, carried on no affairs, and remained completely dormant although not legally dissolved; a subsequent refund of customs duties was therefore held not to be income to the corporation. *United States* v. *Horschel*, 205 F. 2d 646 (C.A. 9, 1950), and *Telephone Directory Advertising Co.* v. *United States*, 135 Ct. Cl. 670, 142 F. Supp. 884 (1956), both involved corporations which had already conveyed all their assets to their stockholders; there were no liquidating trustees, no debts, no business being settled, and no claim that the corporations remained in existence. The cases turned on the Government's attempt to tax certain income to the companies on the ground that the prior distribution of the assets had amounted to an anticipatory assignment of income already earned by the corporations. For a similar case, see *United Mercantile Agencies* v. *Commissioner*, 34 T.C. 808 (1960).[8] In *Commissioner* v. *Henry Hess Co.*, 210 F. 2d 553 (C.A. 9, 1954), the corporation had likewise distributed to its stockholders all its assets, including a claim against the War Shipping Administration, but that agency erroneously refused to make payment on the claim to anyone other than the company, which immediately handed over the money to the shareholders; on these facts the court held that the company, which was in fact fully liquidated, could

[8] *Williamson* v. *United States*, Ct. Cl. No. 86-59, decided July 19, 1961, 292 F. 2d 524, is a case of this type in which it was held that there was an impermissible anticipatory assignment of earned income by the dissolved corporation.

not be said to have continued its existence just because of the Government's mistaken insistence on treating it as such. The present case is also different from *Cold Metal Process Co.* v. *Commissioner*, 247 F. 2d 864, 873-74 (C.A. 6, 1957), in which the corporation had distributed all its assets and had no debts or disbursements; after dissolution, the remaining stockholder brought suit or maintained existing suits, using the corporate name, on claims arising out of pre-dissolution activity; the court found, however, that these actions were solely for the benefit of the stockholder and not in the corporation's "own right." Here, the course of continued corporate conduct is significantly greater.

The plaintiffs are not entitled to recover and their petition is dismissed.

DURFEE, *Judge*; LARAMORE, *Judge*; WHITAKER, *Judge*; and JONES, *Chief Judge*, concur.

FINDINGS OF FACT

The court, having considered the evidence, the report of Trial Commissioner W. Ney Evans, and the briefs and argument of counsel, makes findings of fact as follows:

1. (a) The United States Asphalt Refining Company (hereinafter Asphalt) was incorporated under the laws of the State of South Dakota on September 5, 1911. On October 22, 1928, pursuant to a motion filed by Asphalt, the Circuit Court of the State of South Dakota decreed that Asphalt be dissolved and its charter annulled. All of Asphalt's capital stock at all times was owned by the Interocean Oil Company (hereinafter Interocean), and none of it was disposed of by Interocean.

(b) Interocean was incorporated under the laws of South Dakota on December 6, 1912, and, according to the provisions of its certificate of incorporation, was to continue in

existence for a period of 25 years, at the end of which period its charter expired, and no application was ever filed for an extension.

2. (a) Section 8819, 2 South Dakota Code (1919), as amended by chapter 76, South Dakota Session Laws (1927), provides as follows:

> *Trustees on Dissolution.* Unless other persons are appointed by the court, the directors or managers of the affairs of any corporation at the time of its dissolution shall be trustees of the creditors and stockholders or members of such corporation, and have full power to settle its affairs, sell and convey its property, collect and pay the corporate debts, and divide among the stockholders and members the property, or the proceeds of the sale thereof, which remain after the payment of debts and necessary expenses; and for such purposes may maintain and defend actions in their own names by the style of the trustees of such corporation dissolved, naming it; and no action to which any such corporation is a party shall abate by reason of such dissolution.

(b) Pursuant to this section, on October 22, 1928, as the then surviving directors of Asphalt, O. E. Thurber and Nils B. Hersloff became "trustees of the creditors and stockholders" of Asphalt. On December 6, 1937, they similarly became "trustees of the creditors and stockholders" of Interocean. Thereafter, on April 23, 1941, Thurber died, leaving Nils B. Hersloff as the sole surviving trustee.

3. (a) On February 27, 1956, an order was made by the Circuit Court of South Dakota on the petition of the said trustee Nils B. Hersloff, which said order appointed petitioner Sigurd N. Hersloff and Louis G. Bernstein as trustees to act with the said Nils B. Hersloff with the pro-

vision that, upon the death, resignation, or incapacity of any such trustee or trustees, the survivors or survivor thereof shall continue to act with full power, the said order providing in part, as follows:

> IT IS FURTHER ORDERED that Sigurd N. Hersloff of Long Point, Oxford, Maryland, and Louis G. Bernstein of 25 Rosalind Place, Lawrence, Long Island, New York, be, and they are hereby, appointed as trustees for the stockholders of United States Asphalt Refining Company, a corporation, and The Interocean Oil Company, a corporation;
>
> IT IS FURTHER ORDERED that said Sigurd N. Hersloff and Louis G. Bernstein act as trustees with the now surviving trustee of said dissolved corporations, that is to say Nils B. Hersloff, and
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> • • • • • •
>
> IT IS FURTHER ORDERED that said trustees are appointed for the purpose of liquidating or winding up the affairs of the two dissolved corporations.

(b) On August 15, 1956, the said Nils B. Hersloff died, leaving the said Sigurd N. Hersloff and Louis G. Bernstein as surviving trustees.

(c) Louis G. Bernstein, one of the trustees, died July 28, 1958, and by order of the South Dakota Circuit Court, Sixth Judicial District, dated October 15, 1958, William A. Sands, Jr., was appointed as successor trustee in his place; the said order providing, in part, as follows:

> IT IS FURTHER ORDERED that William A. Sands, Jr., of 180 Central Park South, New York, N. Y., be, and is hereby, appointed as trustee for the stockholders of United States Asphalt Refining Company, a corporation, and The Interocean Oil Company, a corporation;

IT IS FURTHER ORDERED that said William A. Sands, Jr., act as trustee with the now surviving trustee of said dissolved corporations, that is to say Sigurd N. Hersloff, and

* * * * * *

IT IS FURTHER ORDERED that said trustee is appointed for the purpose of liquidating or winding up the affairs of the two dissolved corporations.

(d) William A. Sands, Jr., the successor trustee appointed as above, died on April 1, 1959, and by order of said South Dakota Circuit Court dated June 11, 1959, the above-named Joseph J. Stern was appointed as successor trustee in his place, to serve with Sigurd N. Hersloff, the said order providing in part, as follows:

IT IS FURTHER ORDERED that Joseph J. Stern of 40 Wall Street, New York 5, N. Y., be, and is hereby, appointed as trustee for the stockholders of United States Asphalt Refining Company, a corporation, and The Interocean Oil Company, a corporation;

IT IS FURTHER ORDERED that said Joseph J. Stern, act as trustee with the now surviving trustee of said dissolved corporations, that is to say Sigurd N. Hersloff, and

* * * * * *

IT IS FURTHER ORDERED that said trustee is appointed for the purpose of liquidating or winding up the affairs of the two dissolved corporations.

(e) Said Sigurd N. Hersloff and Joseph J. Stern are now serving as surviving trustees; and they, as trustees, are the only persons entitled to assert the claims presented in this case.

4. Upon the hearing before the commissioner of this court, the plaintiffs moved to substitute the said Joseph J. Stern as trustee, in the place and stead of William A. Sands, Jr., deceased; and the commissioner ruled that the title of the action, insofar as it concerned the plaintiffs, should be changed to read "Sigurd N. Hersloff and Joseph J. Stern, trustees on dissolution, pursuant to Section 8819, of the Compiled Laws of South Dakota, for the United States Asphalt Refining Company and Interocean Oil Company, dissolved corporations, as plaintiffs," without deciding or intending to decide whether the said persons were acting as trustees for the stockholders or as trustees for the two dissolved corporations.

5. On October 22, 1928, Asphalt had as an asset an award of the Mixed Claims Commission, United States and Germany, made on August 13, 1926, in favor of Asphalt in the sum of $150,000 with interest at the rate of 5 percent per annum from November 11, 1918, to date of payment, which award represented the value of the interest of Asphalt as charterer of certain steamers, the "Cymbeline," the "Rosalind," and the "Silvia," lost through acts of Germany during World War I.

6. On December 6, 1937, one of Interocean's assets was an award of the Mixed Claims Commission, United States and Germany, made on August 13, 1926, in favor of Interocean, in the sum of $447,000, with interest at the rate of 5 percent per annum from August 13, 1916, to date of payment, which award represented the value of the interest of Interocean as charterer of a certain steamer, the "Christian Knudsen," lost through acts of Germany during World War I.

7. (a) The awards of the Mixed Claims Commission, United States and Germany, referred to above, provided that the Government of Germany was obligated to pay the

amount of the awards to the Government of the United States on behalf of Asphalt and Interocean, respectively.

(b) Notices of the said awards were given by two letters from the agent of the Mixed Claims Commission, dated September 28, 1926. The said notices advised the recipients that the granting of the awards did not mean immediate payments as no funds as yet had been provided for the satisfaction of the claims.

8. (a) Pursuant to section 2(a) of the Settlement of War Claims Act of 1928,[1] the Secretary of the Treasury was authorized and directed to pay Asphalt $218,547.95, consisting of the principal of the award in the amount of $150,000, plus $68,547.95, representing interest on the $150,000 at the rate of 5 percent per annum from November 11, 1918, to January 1, 1928.

(b) Pursuant to this same section, the Secretary of the Treasury was authorized and directed to pay Interocean $698,054.79, consisting of the principal of the award in the amount of $447,000, plus $251,054.79, representing interest on the $447,000 at the rate of 5 percent per annum from October 8, 1916, to January 1, 1928.

9. On account of the awards referred to in findings 5 and 6, payments were made to the trustees of Asphalt and Interocean, less a statutory deduction of one-half of 1 percent for administrative expenses as follows:[2]

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[1] 45 Stat. 254.

[2] The amounts shown in findings 9 and 10 under the heading "Principal" are amounts paid or payable under section 2(b) of the Settlement of War Claims Act of 1928 and consist in part of the original award and in part of interest on the original award for a period prior to January 1, 1928. The amounts shown in findings 9 and 10 under the heading "Interest" are amounts of interest paid or payable under section 2(c) of the Settlement of War Claims Act of 1928.

Date of check	Interocean		Asphalt	
	Principal	Interest	Principal	Interest
Aug. 6, 1928	$100,000.00		$100,000.00	
Aug. 22, 1928	179,416.44		35,386.57	
Jan. 15, 1929	41,863.84			
Aug. 8, 1931	23,486.27			
Aug. 8, 1931	35,585.25			
Aug. 8, 1931	22,320.58			
Aug. 8, 1931	31,536.03			
Aug. 8, 1931	26,374.22			
Aug. 18, 1931			8,298.36	
Aug. 10, 1931			5,227.96	
Aug. 10, 1931			6,251.15	
Aug. 10, 1931			4,424.43	
Aug. 18, 1931			7,053.80	
Aug. 18, 1931			4,655.51	
Sept. 30, 1931	24,117.50		12,709.53	
July 10, 1941	8,667.74			
May 20, 1941			1,718.14	
Oct. 15, 1941	7,305.33			
Oct. 20, 1941			1,448.08	
Dec. 31, 1947		$20,835.95		$4,479.94
Dec. 31, 1948		7,818.42		1,675.39
Sept. 11, 1952		2,778.41		
Sept. 17, 1952				588.78
Dec. 1, 1953		10,106.28		2,136.46
June 1, 1954		10,140.66		2,138.57
Mar. 22, 1956		12,530.51		2,636.23
June 1, 1956		11,027.53		2,314.72
June 1, 1957		10,337.32		2,164.19
June 1, 1958		12,818.72		2,676.99

10. The balance due on the awards was as follows on the stated dates:

Date	Interocean		Asphalt	
	Principal	Interest	Principal	Interest
Aug. 8, 1931	$237,472.24	$78,706.48		
Aug. 18, 1931*			$82,983.56	$19,465.75
Oct. 15, 1941**	157,381.67	167,349.00		
Oct. 20, 1941**			31,196.60	32,982.58
Dec. 1, 1953	157,381.67	212,995.60	31,196.60	34,927.44
June 1, 1958	157,381.67	177,177.17	31,196.60	36,960.67

* Before payments of that date.
** After payments of that date.

11. (a) The Act of August 6, 1947[3] amended the War Claims Act of 1928 and provided for the deposit into the

[3] 61 Stat. 789.

German Special Account of certain funds held in the Alien Property Trust Fund for payment of the awards of the Mixed Claims Commission.

(b) On February 27, 1953, a debt settlement agreement was made with Germany, subsequently duly ratified, whereunder annual payments were to be made by Germany for the holders of awards, including the awards of Interocean and Asphalt, to a stated total amount over a period of 26 years, commencing April 1, 1953.

12. (a) After the making of the said awards, litigation ensued by Bainbridge Colby and Edward D. Brown, who had served as counsel for Interocean and Asphalt in the prosecution of the claims stated above before the Mixed Claims Commission, in the then Supreme Court of the District of Columbia, with respect to the amount of their counsel fees to be paid out of the proceeds of the aforementioned awards.

(b) The litigation was settled. Pursuant to the settlement, the court entered a decree dated August 4, 1931, which, among other things, provided that Colby and Brown should recover for legal services theretofore rendered, the sum of $131,020.39 from Interocean, Asphalt, and Thurber and Hersloff, as trustees, with reference to the sum of $454,560.45 already received by Interocean, Asphalt, and Thurber and Hersloff in part payment of the awards referred to in findings 5 and 6, and also with reference to the sum of $174,337.41 then available in the Treasury of the United States for further part payment of said awards; and that Colby and Brown should recover from the same corporations and trustees 21⅓ percent of all sums thereafter to be paid on account of principal and interest on said awards (exclusive of the $174,337.41, above-mentioned, then ready for payment by the Treasury).

(c) The said decree also provided that Colby and Brown should have an equitable lien on the funds then held or which might thereafter be held by the Secretary of the Treasury and the Treasurer of the United States for payment of said awards, and on any check or warrant issued in payment thereof. To assure the payment of such percentage in the future, the decree directed the Secretary of the Treasury and the Treasurer of the United States to deliver to Interocean, Asphalt, and the trustees all checks and warrants in payment of said awards only through and in care of the Riggs National Bank of Washington, D.C., such bank to forward same to its New York City banking correspondent for endorsement by the payees and return to the bank to be cashed and disbursed as provided in said decree, that is, to pay the said Colby and Brown the $21\frac{2}{3}$ percent as their fees and thereafter to pay the remainder of the sums so received to Interocean, Asphalt, and the trustees after the bank deducted its reasonable compensation.

(d) The decree also provided that the payments to Interocean, Asphalt, and the trustees should be made by check of the bank to the order of Interocean, whose receipt should fully discharge and acquit the bank for all payments due Interocean, Asphalt, and the trustees.

(e) The decree also provided that Interocean, Asphalt, and the trustees were perpetually enjoined from applying for, demanding of, or receiving from the United States or from any officer thereof any warrant, draft, check, or order in payment of the awards or any part thereof, otherwise than as provided for in said decree.

(f) The decree also provided that all of its provisions should apply to the funds provided by the then present law for the payment of the said awards and to any funds which should be provided by any subsequent law, treaty, or other-

wise for the payment of said awards, and that the decree should be binding upon Interocean, Asphalt, Thurber, Hersloff, and their agents, successors, assigns, heirs, administrators, and executors, and binding upon and inuring to the benefit of the plaintiffs, Colby and Brown, their agents, attorneys, heirs, administrators, executors, and assigns.

13. (a) Thereafter and prior to February 21, 1939, the trustees of Asphalt and Interocean assigned an interest of 1⅙ percent in said awards to Walter M. Bastian, and Harvey D. Jacob, the attorneys who represented them in the aforesaid litigation in the then Supreme Court of the District of Columbia, in payment of their fees as said attorneys.

(b) Thereafter and on February 21, 1939, the trustees of Asphalt and Interocean assigned to (1) Ellwood M. Rabenold, and others, constituting the law firm of Rabenold, Scribner and Miller, general counsel for the trustees, in payment for their legal services to the trustees, 10 percent of the net balance of said awards, together with interest thereon, after deducting therefrom the 21⅔ percent directed to be paid to Colby and Brown, and the 1⅙ percent assigned to Bastian and Jacob; and (2) Edward D. Brown, and Edgar A. Pollack, constituting the law firm of Brown & Pollack, attorneys for the trustees in certain matters, in payment for their legal services to the trustees, 5 percent of the net balance of said awards, together with interest thereon, after deducting therefrom the 21⅔ percent directed to be paid to Colby and Brown, and the 1⅙ percent assigned to Bastian and Jacob.

(c) About 1939, an attorney, Harvey Jacob, of Washington, represented Interocean in a tax case with Internal Revenue Service. He claims Interocean owes him for part of his fee, and he is holding stock of Interocean as security for his claim. The stock has never been canceled. The

certificates for the stock of Interocean had been delivered to said Harvey Jacob on May 26, 1938, and he gave a receipt therefor. The certificates for all said stock were endorsed in blank, except a certificate for 50 shares of common stock in the names of five trustees under a trust agreement dated October 29, 1917, which was not endorsed.

14. Since a time prior to the tax years for which deficiencies were assessed (as hereinafter stated), the trustees (a) received payments on account of the awards[4] through the Riggs National Bank of Washington pursuant to the decree of August 4, 1931; (b) paid the bank fees, trustees' commissions, and amounts due attorneys pursuant to the decree and assignments hereinabove described; and (c) divided and paid over the balance of the payments to the stockholders of Interocean pro rata. Other activities of the trustees are set forth in findings 18, 19, and 20.

15. There were no payments of principal or interest on account of the awards to Asphalt or Interocean or the trustees between September 30, 1931, and July 10, 1941. In this interval another class of claimants against Germany, known as the "Black Tom" sabotage claimants, asserted a right to participate in the same fund from which the trustees of Asphalt and Interocean were to be paid their awards or on account thereof; and on or about June 15, 1939, the "Black Tom" claims were allowed in the total amount of $50,000,000 and held able to participate in the same fund.

16. In October 1941, the Treasury Department advised the trustees of Asphalt and Interocean that the Secretary of the Treasury had determined that there were sufficient funds available in the German Special Deposit Account to

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[4] Since 1941, payments have been made of interest only.

make a small payment on account of principal; and it also advised that such amount to be distributed would exhaust the funds in such German Special Deposit Account and that the payments to be made would complete the payments to American nationals under the provisions of paragraph 5 of section 4 of the Settlement of War Claims Act of 1928. The payments referred to in the communications from the Treasury Department were paid October 15 and 20, 1941.

17. (a) When Interocean's charter expired in 1937, the potential assets of Interocean and Asphalt consisted of (1) the two awards of the Mixed Claims Commission, described in findings 5 and 6, and (2) three claims, hereinafter described in findings 18, 19, and 20, under the headings "British claim," "Azua property," and "Carteret property."

(b) After the payments of October 15 and 20, 1941, described in finding 16, counsel for the trustees were of the opinion that the assets and claims of Interocean (including Asphalt) were of doubtful or no value, and they so reported on September 15, 1942, to the executors of the estate of O. E. Thurber (who died on April 23, 1941). Thurber had been the owner of a substantial amount of the stock of Interocean.

(c) In Schedule F of the Federal estate tax return of the Thurber estate, the executors referred to the said opinion of counsel for the trustees and reported that said stock interest and a claim for money advances made by the decedent in his lifetime to Interocean and one of its subsidiaries were of no value. The lack of value so reported was accepted by the Internal Revenue agent.

18. (a) "British claim." In May 1915 and August 1916, the Government of Great Britain, through the British Ad-

miralty, requisitioned two tankers, the "Rosalind" and the "Georgian Prince," from a wholly owned subsidiary of Interocean. The British Admiralty paid to Interocean's subsidiary charter hire at the so-called "Blue Book" rate. Interocean claimed that such rate was less than the market rate. The claim was presented by Interocean to the United States Department of State in 1927 on the theory that it fell within the scope of the arrangement effected by an exchange of notes between the United States and Great Britain, signed on May 19, 1927.[1]

(b) The claim was considered by the legal adviser, the Under Secretary of State, and the Secretary of State, prior to the signing of the agreement on May 19, 1927, and it was their unanimous conclusion that the claim had no merit. The State Department advised Interocean's counsel on August 31, 1927, that the Department did not regard the claim as a valid one. Nevertheless, the claim was persistently pressed thereafter by Interocean's attorneys.

(c) In 1938, Interocean filed with the State Department a claim against Great Britain for 344,082 pounds sterling, or, converted into dollars, an amount in excess of $1 million. Thereafter, it actively pressed the claim. In 1950, the trustee for Interocean and his attorneys went to the State Department and conferred with the officials handling the claim. By letter of March 20, 1951, the claim was rejected.

(d) On September 10, 1956, the trustee of Interocean referred the claim to an attorney in Washington for his evaluation. The attorney investigated the claim, and on March 3, 1958, he went to the State Department to determine the status of the claim and to discuss it with the legal

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[1] Treaty Series No. 756.

adviser. Since then, no further action has been taken with respect to this claim.

(e) Before the trustee referred the claim to the Washington attorney in 1956 and in 1952, the attorney who had represented Interocean in connection with the said matter recommended that the claim be dropped. The Washington attorney reported to general counsel of the trustees on March 6, 1958, after his visit to the State Department on March 3, 1958, that the Department would be willing to submit the matter to arbitration although the Department adhered to its position that the claim was without merit. The trustees' general counsel thereupon reviewed the decisions of prominent Federal judges who had acted as arbitrators in similar matters in which they had held that the so-called "Blue Book" rates were adequate compensation; and general counsel decided to abandon the claim.

19. (a) "Azua property." This "property" consisted of two parcels of land, one oil land and one timberland, in the Dominican Republic. Neither parcel was surveyed. Prior to 1942, Interocean had been unable to sell these properties at any price. In 1942, however, counsel for the trustees were of the opinion that Interocean owned the two parcels, and estimated that the oil land contained 15,000 or 20,000 acres and that the timberland contained 150,000 acres. Interocean's title to these lands had been certified by an attorney.

(b) The oil lands were tested (date unspecified) and found to have no oil in commercial quantity.

(c) Further investigation by counsel for the trustees in 1951 and 1952 revealed that Interocean did not have title originally or that title had been lost by reason of nonpayment of taxes or through confiscation.

20. (a) "Carteret property." This property consisted of three parcels of land located in the Borough of Carteret, Middlesex County, New Jersey. Title was held by a subsidiary of Interocean.

(b) In 1942, two of the tracts were subject to a mortgage of $50,000 in favor of O. E. Thurber, a trustee of Interocean and Asphalt, and the third parcel was subject to a mortgage of $20,000 in favor of Nils B. Hersloff, another of the trustees. At that time counsel for the trustees were of the opinion that the parcels could not be sold for a price equal to the mortgages.

(c) In 1943, the two tracts mortgaged to Thurber were sold for $52,000. Of this sum, $40,900 was paid to the Thurber estate in satisfaction of the mortgage.

(d) In 1947, Nils B. Hersloff sued to foreclose the mortgage in his favor. The tract was sold for an undisclosed price to a purchaser who paid $1,500 above the amount required to satisfy the mortgage.

(e) Thereafter, in July 1947, following payment of expenses of $850, the net balance of $650 was paid to the trustees of Interocean.

21. The books and records for Asphalt and Interocean and the trustees named herein were kept and their Federal tax returns prepared on the cash basis and for calendar years ending December 31.

22. Corporate income tax returns were filed for Asphalt and Interocean for the years 1928-1931, 1941, and 1948. On these returns, the payments made with respect to the two awards were reported as income, and a tax was paid on account thereof. For these years, no refund claim has been filed or tax refunded on the ground that either corporation was no longer in existence for tax purposes.

23. For the years 1952, 1953, and 1954, the trustee Nils B. Hersloff filed fiduciary returns on Form 1041, reporting as income payments from the Mixed Claims Commission. The returns showed no tax due, a deduction being claimed for attorneys' fees, and the balance of the income as having been distributed.

24. On May 31, 1956, deficiencies in corporate income tax were assessed[6] against trustee Nils B. Hersloff as follows:[7]

Year	*Asphalt*	*Interocean*
1949	$225.15	$1,059.57
1953	393.63	1,914.78
1954	400.97	1,924.90

25. (a) The assessments of tax and interest against Asphalt were satisfied by a payment of $1,128.42 on June 24, 1955. The assessments of tax and interest against Interocean were satisfied by a payment of $5,416.11 on June 24, 1955. Such payments were accompanied by a letter from the attorneys for the trustee stating that the payments were made without waiting for assessment in order to avoid the further running of interest, and that it was proposed to file promptly claims for refund.

(b) On November 5, 1956, plaintiffs filed with the said District Director claims for refund of the taxes paid for 1949, 1953, and 1954, in the total amount of $6,544.53.

(c) On April 10, 1958, statutory notices of disallowance were issued with respect to these six claims for refund.

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[6] Prior to the assessments, the trustee was sent 30- and 90-day letters.

[7] Payments were treated as income of the corporations for the years received. The checks dated December 31, 1948 (see finding 9) were received by the trustee in January 1949. Payments made in 1953 were received in 1953; and payments made in 1954 were received in 1954.

26. The parties have agreed that if the plaintiffs are entitled as a matter of law to recover, judgment shall be entered in favor of the trustees of Asphalt for $1,128.42, and judgment shall be entered in favor of the trustees of Interocean for $5,416.11, plus interest on both amounts as provided by law.

CONCLUSION OF LAW

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that plaintiffs are not entitled to recover, and the petition is therefore dismissed.

Affidavit of Nils B. Hersloff (Def. Ex. 4).

STATE OF MASSACHUSETTS)
COUNTY OF BERKSHIRE) ss.:

NILS B. HERSLOFF, being duly sworn, says:

I am the Liquidating Trustee of The Interocean Oil Company and was previously the Treasurer of the Corporation from its inception to the date of its dissolution.

Attached hereto as Exhibits are the following:

1. List of outside stockholders of The Interocean Oil Company on May 28, 1915.

2. List of stock held on May 28, 1915 for the five principals,—May O. Govin, Richard D. Upham, Orray E. Thurber, George W. S. Whitney and Nils B. Hersloff.

3. Photostat of Trustees' receipt issued November 1, 1917.

4. List of present outstanding stock of The Interocean Oil Company.

5. Copy of receipt of Harvey D. Jagob for the present outstanding stock certificates, dated May 26, 1938.

The total of lists marked Exhibits 1 and 2 comprise all of the stock of The Interocean Oil Company outstanding on May 28, 1915 in the following aggregate amounts:

	Common	*First Preferred*	*Second Preferred*
May 28, 1915:	95,000	6,160	23,000
Subsequently acquired for Interocean Oil Company and cancelled:	91,235½	6,065	16,104½
Stock outstanding: .. (since 1918)	3,764½	95	6,895½

The amount of stock now outstanding is reflected in the stock book of The Interocean Oil Company, and is set forth in Exhibit 4 annexed hereto, and also conforms with Exhibit 5 annexed hereto.

The Trustees' receipts (Exhibit 3 annexed) were issued to the five principals above named on or about the 1st day of November, 1917. In 1925 Mrs. Govin transferred a portion of her interest to the other four parties. The certificates presently outstanding are held by the following in the respective proportions indicated:

May O. Govin	2/16	
Heirs of Richard D. Upham	3/16	(died September 29, 1924)
Heirs of Orray E. Thurber	3/16	(died April 23, 1941)
George W. S. Whitney	3/16	(transferred 1920 to wife Mildred R. T. Whitney)
Nils B. Hersloff	5/16	(transferred March 1941 to wife Lyda W. Hersloff)

all as shown by affidavits heretofore duly made and filed with the State Department by the various parties and heirs above mentioned.

NILS B. HERSLOFF.

Sworn to before me this
19th day of June, 1950

THOMAS A. MORE
Notary Public
My Commission Expires March 12, 1954

(notarial seal)

EXHIBIT 5

RECEIVED the following certificates:

(1) Cert. No. 196 for 90 shares of the FIRST PREFERRED capital stock of THE INTEROCEAN OIL COMPANY, dated December 30th, 1927, in the name of N. B. HERSLOFF which has been endorsed in blank by N. B. Hersloff in the presence of O. E. Thurber.

(2) Cert. No. 195 for 5 shares of the FIRST PREFERRED capital stock of THE INTEROCEAN OIL COMPANY, dated December 30th, 1927, in the name of O. E. THURBER, which has been endorsed in blank by O. E. THURBER in the presence of N. B. HERSLOFF.

(3) Cert. No. 505 for 45 shares of the common capital stock of THE INTEROCEAN OIL COMPANY, dated December 30th, 1927, in the name of N. B. HERSLOFF which has been endorsed in blank by N. B. HERSLOFF in the presence of O. E. Thurber.

(4) Cert. No. 506 for 22 shares of the common capital stock of THE INTEROCEAN OIL COMPANY, dated December 30th, 1927, in the name of O. E. THURBER which has been endorsed in blank by O. E. Thurber in the presence of N. B. Hersloff.

(5) Cert. No. 331 for 3234 shares of the SECOND PREFERRED stock of THE INTEROCEAN OIL COMPANY dated Nov. 9, 1917, in the name of R. R. GOVIN, R. D. UPHAM, O. S. THURBER, GEO. W. S. WHITNEY and N. B. HERSLOFF, Trustees, endorsed in blank by O. E. Thurber, and N. B. Hersloff, Trustees, in the presence of E. A. Sauter.

(6) Cert. No. 400 for 24 shares of the SECOND PREFERRED stock of THE INTEROCEAN OIL COMPANY dated Dec. 30, 1927, in the name of O. E. THURBER which has

been endorsed in blank by O. E. THURBER in the presence of N. B. Hersloff.

(7) Cert. No. 322 for 3637½ shares of the SECOND PREFERRED STOCK OF THE INTEROCEAN OIL COMPANY, dated Sept. 13, 1917, in the name of WILLIAM R. BRITTON assigned in blank on Sept. 18, 1917 by WILLIAM R. BRITTON in the presence of W. E. Keegan.

(8) Cert. No. 507 for 2823½ shares of the COMMON stock of THE INTEROCEAN OIL COMPANY, dated July 1, 1935 in the name of WILLIAM R. BRITTON and endorsed on July 1, 1935 in blank by William R. Britton in the presence of William E. Keegan.

(9) Cert. No. 508 for 814 shares of the COMMON stock of THE INTEROCEAN OIL COMPANY, dated July 1, 1935 in the name of WILLIAM R. BRITTON and endorsed on July 1, 1935 in blank by WILLIAM R. BRITTON in the presence of William E. Keegan.

(10) Cert. No. 431 for 50 shares of the COMMON stock of the Interocean Oil Company, dated Nov. 9, 1917 in the name of R. R. Govin, R. D. UPHAM, O. E. THURBER, GEO. W. S. WHITNEY and N. B. HERLOFF, Trustees which certificate has not been endorsed.

(11) Cert. No. 181 for 2 shares of the COMMON stock of the INTEROCEAN OIL COMPANY, dated July 3, 1913, in the name of N. B. HERSLOFF, which has been endorsed in blank by N. B. Hersloff in the presence of Geo. W. S. Whitney.

(12) Cert. No. 504 for 2 shares of the COMMON stock of the INTEROCEAN OIL COMPANY, in the name of N. B. HERSLOFF dated Jan. 7th, 1927, which has been (in blank) endorsed by N. B. Hersloff in the presence of O. E. Thurber attached to which has been affixed stock transfer stamps in the amount of $4.04.

(13) Cert. No. 503 for 2 shares of the COMMON stock of The Interocean Oil Company in the name of O. E. Thurber dated Jan. 7th, 1927, which has been endorsed in blank by O. E. Thurber in the presence of N. B. Hersloff, to which have been affixed Stock Transfer stamps in the amount of $4.04.

(14) Cert. No. 182 for 2 shares of The Interocean Oil Company, common Capital Stock in the name of O. E. THURBER, dated July 13, 1913 which has been endorsed by O. E. Thurber in blank in the presence of Geo. W. S. Whitney.

(15) Cert. No. 501 for 1 share of the COMMON Stock of the Interocean Oil Company dated Jan. 7th, 1927, in the name of ELLWOOD M. RABENOLD, which has been endorsed by Ellwood M. Rabenold in the presence of N. B. Hersloff, affixed to which are stock transfer stamps in the sum of $2.02.

(16) Cert. No. 502 for 1 share of the common stock of the Interocean Oil Company in the name of S. N. Hersloff, dated Jan. 7th, 1927 endorsed by S. N. Hersloff before N. B. Hersloff to which are affixed stock transfer stamps for $2.02.

DATED: New York, May 26, 1938

HARVEY D. JACOB (sgd)

Appendix.

Letter to Treasury Department (Pl. Ex. 3).

May 2, 1955

Re: Mixed Claims Commission,
United States and Germany

Award to The Interocean Oil Company
Docket No. 6848
Award to The United States Asphalt
Refining Company—
Docket Nos. 6630, 6632, 6631

Treasury Department
Bureau of Accounts
Investment Branch
Washington 25, D. C.

Sirs:

The Interocean Oil Company, above named, a South Dakota corporation, was incorporated December 6, 1912; its charter expired December 6, 1937. Mr. Nils B. Hersloff has been and now is Liquidating Trustee of the Corporation since the expiration of its charter.

The United States Asphalt Refining Company, above named, a wholly owned subsidiary of The Interocean Oil Company, was likewise a South Dakota corporation from the time of its incorporation on September 5, 1911, until its voluntary dissolution on October 22, 1928. Mr. Hersloff has been a trustee of the Corporation since its dissolution, and now is the surviving trustee.

Under the laws of South Dakota governing the dissolution, the directors became "trustees of the creditors and stockholders" (South Dakota Compiled Laws of 1929, Sec. 8819).

In the past you have recognized Mr. Hersloff's trusteeship of these two corporations, and have made payments on the awards to him as such trustee.

The corporations have been completely liquidated for many years. It is, of course, not feasible to transfer the awards into the names of the stockholders, so Mr. Hersloff as trustee has been acting as an agency to receive the payments, pay prior charges, fees and expenses and make distributions of the remaining proceeds to the stockholders of the parent company, The Interocean Oil Company. One payment is currently due, and it is expected that additional payments on the awards will be received over the next 23 years. It is important, therefore, to provide a more permanent and self-perpetuating agency to handle the payments. We have accordingly prepared the enclosed assignment of the balance due on the awards from Mr. Hersloff as trustee for the Companies to himself and to other persons as trustees for the stockholders of The Interocean Oil Company. Pursuant to such laws of South Dakota, Mr. Hersloff as Liquidating Trustee possesses "full power to * * * divide among the stockholders * * * the property" of the Corporations.

We should like to ascertain whether such an assignment would be recognized by you for future payments on the awards and, if not, to receive your suggestions how the matter may best be handled. In view of the complete liquidation of both corporations, so that ownership of the awards is vested in the stockholders (see *Barker* v. *Edwards*, 259 Fed. 484, 489, and *Rossi* v. *Cairo*, 161 Pac. 1161, decided under similar statutes), the South Dakota court would have no jurisdiction; it is a matter that must be governed by agreement between the parties in interest, subject, of course, to your approval as the disbursing agency under the awards.

Appreciating your courtesy and cooperation in connection with this matter, we are

Very truly yours,

SCRIBNER & MILLER

3
Enc.

Appendix.

Letter From Treasury Department (Pl. Ex. 4).

TREASURY DEPARTMENT
FISCAL SERVICE
Washington 25

Dec. 13, 1955

Scribner & Miller
40 Wall Street
New York 5, New York

Gentlemen:

Re: Mixed Claims Commission, United States and Germany
Award to The Interocean Oil Company
Docket No. 6848
Award to The United States Asphalt Refining Company
Docket Nos. 6630, 6631, 6632

The Treasury has given careful consideration to the proposal submitted with your letter of May 2, 1955, that Mr. Nils B. Hersloff, as the sole surviving trustee of the awardee corporations, assign the unpaid balance of these awards to himself and to two additional persons as trustees to collect the payments as they become due and to distribute the proceeds among the persons entitled.

The Treasury is not satisfied that Mr. Hersloff has authority to pass on his duties as statutory trustee to others. While the proposed assignment might be acceptable if consented to by all the interested parties the Treasury does not feel that it should, under the circumstances in this case, undertake to determine the identity of the interested parties and their legal capacity to consent.

Very truly yours,

W. T. HEFFELFINGER
Fiscal Assistant Secretary

Appendix.

Statement to Stockholders (Def. Ex. 5).

To The Stockholders Of The Interocean Oil Company:

The United States Treasury this month paid $15,397.72 as the distribution for 1960 on account of the Mixed Claims Commission Awards. As shown in the attached accounting $6,242.19 was paid for past legal fees incurred in prosecuting the awards, and trustees' commissions, leaving a balance of $9,155.53. Distribution is now being made to the stockholders of $7,056, retaining $2,099.53 as a reserve for taxes for 1960 until the question of liability for corporate income taxes in the suit now pending in the U. S. Court of Claims is finally determined.

Enclosed is our check for your share of this distribution. Kindly acknowledge receipt to us, c/o Scribner & Miller, 40 Wall Street, New York 5, N. Y.

Sigurd N. Hersloff and Joseph J. Stern
as trustees for the Stockholders of the
Interocean Oil Company, a dissolved corporation.

By Sigurd N. Hersloff
Sigurd N. Hersloff

1960 Statement of Receipts and Disbursements

Receipts:

Interocean Oil Company	$12,749.30		
U. S. Asphalt Refining Co.	2,648.42	Total	$15,397.72

Disbursements:

Estate of Bainbridge, Colby and Edward D. Brown—21⅔% of gross receipts	3,336.17		
Biggs Bank—collection fee	50.00	Balance	12,011.55
Walter M. Bastian—7/12ths of 1%	70.07		
Harvey D. Jacobs—7/12ths of 1%	70.07	Net	11,871.41
Edgar A. Pollack—2½% of Net	296.79		
Est. of Edward D. Brown—2½% of Net	296.79		
Scribner & Miller—10% of Net	1,187.14		
Scribner & Miller—Disbursements	155.28		
Trustees' Commissions—5% of gross	769.88		
Stephens, Ritter & Mayer, Esqs.	10.00	Balance	9,155.53
Less Distributions (See Sch. 1)			7,056.00
Balance to Reserve Account			2,099.53

Reserve Account

Balance July 11, 1960	$13,007.59		
Add 1960 Reserve	2,099.53	Total	15,107.12

Appendix.

SCHEDULE I

DISTRIBUTION OF $7,056 (1/16 SHARE = $441.00)

		Share	*Amount*
Estate of Lyda W. Hersloff		5/16	$2,205.
⅓ to Alden Adams Hersloff, as General Guardian of Lyda Watson Hersloff and Harriet Kirsten Hersloff, infants, 44 Golfside Parkway, Brighton, Rochester, New York	$ 735.		
⅓ to Murray D. Safanie and The Chase Manhattan Bank, as Trustees of the Trust under the Will of Lyda W. Hersloff, deceased for the benefit of Sigurd N. Hersloff, 40 Wall St., N. Y. 5, N. Y.	735.		
⅓ to Murray D. Safanie and The Chase Manhattan Bank, as Trustees of the Trust under the Will of Lyda W. Hersloff, deceased, for the benefit of Anna Laura Hersloff, 40 Wall St., N. Y. 5, N. Y.	735.		
	$2,205.		
May O. Govin, c/o William P. McCool, Esq., 67 Wall Street, New York 5, N. Y.		2/16	882.
Heirs of Elizabeth R. Upham, c/o George J. Schaefer, Esq., 654 Madison Avenue, New York 21, N. Y.		3/16	
Helen E. Upham	¼	$330.75	
F. K. Middleton Hunter	½	661.50	
F. K. Middleton Hunter, as Trustee for Elizabeth U. Hunter	⅛	165.38	
F. K. Middleton Hunter, as Trustee for Katharine M. Hunter	⅛	165.37	1,323.
Estate of Mildred R. T. Whitney, c/o Stanley T. Gedney, Jr., Esq., 525 Main Street, East Orange, N. J.		3/16	1,323.
Heirs of O. E. Thurber (49 shares at $27 per share)		3/16	

Appendix.

		Shares	*Amount*	
John S. Sherman c/o W. Ludlow James, Esq. 27 William Street New York 5, N. Y.		16	$432.	
Clayton W. Thurber	"	5	135.	
The Masonic Charity Foundation	"	10	270.	
Beatrice T. Heath	"	1	27.	
Mary A. T. Willis	"	1	27.	
Bessie E. T. Ames	"	1	27.	
Doris M. Thurber, Executrix of the Estate of Frank C. Thurber	"	1	27.	
Bertha B. Gould	"	1	27.	
Florence A. Roberts	"	1	27.	
Frances Letendre	"	1	27.	
Cora M. Megaw	"	1	27.	
Bettie M. Zitko, 84 Maple Avenue, Dover, N. J.		6	162.	
Ella Fralich, 470 Rockaway Road, Dover N. J.		3	81.	
Alton Hedden, R.D. 2, Centre Grove Road, Dover, N. J.		1	27.	1,323.
Total Distribution				$7,056.

Appendix.

Internal Revenue Code of 1939:

SEC. 52. CORPORATION RETURNS.

(a) *Requirement.*—Every corporation subject to taxation under this chapter shall make a return, stating specifically the items of gross income and the deductions and credits allowed by this chapter and such other information for the purpose of carrying out the provisions of this chapter as the Commissioner with the approval of the Secretary may by regulations prescribe. * * * In cases where receivers, trustees in bankruptcy, or assignees are operating the property or business of corporation, such receivers, trustees, or assignees shall make returns for such corporations in the same manner and form as corporations are required to make returns. Any tax due on the basis of such returns made by receivers, trustees, or assignees shall be collected in the same manner as if collected from the corporation of whose business or property they have custody and control.

* * * *

(26 U.S.C. 1952 ed., Sec. 52.)

Internal Revenue Code of 1954:

SEC. 6012. PERSONS REQUIRED TO MAKE RETURNS OF INCOME.

* * * *

(b) *Returns Made by Fiduciaries and Receivers.*—

* * * *

(3) *Receivers, trustees and assignees for corporations.*—In a case where a receiver, trustee in bankruptcy, or assignee, by order of a court of competent jurisdiction, by operation of law or

otherwise, has possession of or holds title to all or substantially all the property or business of a corporation, whether or not such property or business is being operated, such receiver, trustee, or assignee shall make the return of income for such corporation in the same manner and form as corporations are required to make such returns.

* * * *

(26 U.S.C. 1958 ed., Sec. 6012.)

Treasury Regulations 111 (1939 Code):

SEC. 29.22(a)-20. *Gross income of corporation in liquidation.*—When a corporation is dissolved, its affairs are usually wound up by a receiver or trustees in dissolution. The corporate existence is continued for the purpose of liquidating the assets and paying the debts, and such receiver or trustees stand in the stead of the corporation for such purposes. (See sections 274 and 298.) Any sales of property by them are to be treated as if made by the corporation for the purpose of ascertaining the gain or loss. * * *

The pertinent provisions of Treasury Regulations 118 (1939 Code), Section 39.22(a)-20, are identical to the provisions of Section 29.22(a)-20, Treasury Regulations 111, as quoted above.

Treasury Regulations on Income Tax (1954 Code):

SEC. 1.336-1. *General rule on liquidation of corporation.* * * * gain or loss is recognized to a corporation on all sales by it, whether directly or indirectly (as through trustees or a receiver), except as provided in section 337 (relating to sales or exchanges in connection with certain liquidations). * * *

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 982

SIGURD N. HERSLOFF AND JOSEPH J. STERN, TRUSTEES, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. 18–27) is reported at 310 F. 2d 947.

JURISDICTION

The judgment of the Court of Claims was entered on December 5, 1962, and a petition for rehearing was denied on February 6, 1963. The petition for a writ of certiorari was filed on April 3, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the Court of Claims correctly ruled that two corporations, dissolved under the law of their

incorporation, were carrying on sufficient activities through their liquidating trustees to remain in existence for federal income tax purposes.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the 1939 and 1954 Internal Revenue Codes and the Treasury Regulations are set forth in the Appendix, *infra*, pp. 11–13.

STATEMENT

This is a suit for refund of income taxes involving two affiliated South Dakota corporations, United States Asphalt Refining Company (hereinafter referred to as Asphalt) and Interocean Oil Company, the parent of Asphalt (hereinafter referred to as Interocean). Asphalt was dissolved by a South Dakota court in 1928, and, pursuant to South Dakota law, two of its surviving directors became "trustees of the creditors and stockholders." When Interocean dissolved in 1937 because of the expiration of its corporate charter, the same two men became its trustees (Pet. 27–28). Thereafter, by a series of orders of the South Dakota court, successor trustees were appointed on the death of earlier trustees so that the present petitioners, Sigurd N. Hersloff and Joseph J. Stern, are now the duly appointed trustees (Pet. 28–30).

During World War I both Asphalt and Interocean lost chartered steamers, which they owned, through the acts of Germany. In August 1926, prior to the dissolution of either corporation, the Mixed Claims Commission, which was set up to arbitrate claims for the destruction by Germany of American property during World War I, made an award to both corporations

for their lost vessels: $150,000, plus interest, to Asphalt and $447,000, plus interest, to Interocean. No funds were available in 1926, but payments on the awards were authorized by the Settlement of War Claims Act of 1928, 45 Stat. 254. Under this Act and its amendments, the Treasury made intermittent payments of principal and interest to the two corporations and, after their respective dissolutions, to the trustees. In February 1953, the United States concluded with Germany a debt settlement agreement under which the latter was to make annual payments on such awards up to a particular sum over a 26-year period, beginning on April 1, 1953, and ending in 1979 (Pet. 31–34).

The attorneys who represented Asphalt and Interocean before the Mixed Claims Commission sued for their fees. A compromise decree was entered in August 1931, which awarded the attorneys a share of the amounts already paid the two corporations and also established their right to recover from the corporations and the trustees a percentage of all amounts thereafter paid on the awards. The decree also gave the attorneys an equitable lien on all funds to be used for such payments. To enforce these rights, the decree provided that the Treasury was to deliver payments on the awards to the companies and trustees only through the Riggs National Bank in Washington; that bank was to forward the check or warrant to its New York correspondent for endorsement by the payees (the trustees) and return it to Riggs to be cashed and disbursed as required by the decree, *i.e.*, a percentage was to be paid to the attorneys and the rest

to the companies and trustees. The corporations and trustees were enjoined from seeking from the Treasury payment in any other manner (Pet. 34–36).

During or before 1939, the trustees assigned various other portions of the payments on the awards to other attorneys who had rendered legal services to them. Before and including the taxable years involved here, the trustees received payment through the system set up by the 1931 decree, satisfied the bank fees, trustees' commissions, and sums due the various attorneys pursuant to the decree and assignments, and then paid over the balance to the stockholders of Interocean pro rata (Pet. 36–37).

Asphalt had no assets, potential or actual, aside from the award by the Mixed Claims Commission. However, when Interocean's charter expired in 1937, it had certain potential assets, two of which are now relevant. It had a claim against the British Government, which had requisitioned two tankers from Interocean in World War I, for paying charter hire at less than the market rate. In 1927, the State Department rejected the claim as invalid and refused to present it to Great Britain. Nevertheless, Interocean's attorneys persistently continued to press it. A new claim was filed with the State Department in 1938 and actively pursued. There were conferences in 1950, and the claim was again rejected in 1951. In 1956, Interocean's trustee referred the claim to a Washington attorney who investigated it and discussed it again with the State Department in March 1958. He reported to the general counsel for the trustees that the Department was willing to arbitrate

the matter, but the general counsel decided to abandon it since previous arbitrations had held the rates paid by the British to be adequate. Another possible asset consisted of 15,000 acres of oil land and 150,000 acres of timberland in the Dominican Republic. These appear to have been of little value, but the trustees made some efforts to realize on them. Further investigation by the trustees' counsel in 1951 and 1952 revealed either that Interocean did not originally have title or that it had been lost through non-payment of taxes or confiscation (Pet. 38–40).[1]

The taxpayers paid corporate income taxes in behalf of Asphalt and Interocean on the interest on the original awards received in 1949, 1953, and 1954. On November 5, 1956, taxpayers filed claims for refund of these taxes. When these claims were disallowed on April 10, 1958, petitioners brought this suit for refund (Pet. 42). The Court of Claims held that under the facts in this case the two corporations remained in existence so as to be subject to the federal corporate income tax.

ARGUMENT

The only question presented in this case is whether these two South Dakota corporations (Asphalt and Interocean), which were dissolved under South Dakota law, remained in existence for federal income tax purposes during the years 1949, 1953, and 1954. The courts have consistently held that a corporation's

[1] Another asset, the "Carteret property" in New Jersey, is not now pertinent because it was finally disposed of in 1947, prior to the earliest taxable year (1949) in the present case (Pet. 41).

existence for tax purposes continues, despite dissolution, during the period when the corporation is being liquidated by the corporation, by a receiver, by trustees, or by other agents of the corporation. *Wood Harmon Corp.* v. *United States,* 311 F. 2d 918 (C.A. 2); *J. Ungar, Inc.* v. *Commissioner,* 244 F. 2d 90 (C.A. 2); *O'Sullivan Rubber Co.* v. *Commissioner,* 120 F. 2d 845 (C.A. 2); *Northwest Utilities Securities Corp.* v. *Helvering,* 67 F. 2d 619 (C.A. 8); *First Nat. Bank of Greeley, Colo.* v. *United States,* 86 F. 2d 938 (C.A. 10); see also *Caswell* v. *Commissioner,* 36 B.T.A. 816; *Smith* v. *Commissioner,* 26 B.T.A. 1178. As the Second Circuit aptly stated (*O'Sullivan Rubber Co.* v. *Commissioner, supra,* 120 F. 2d at 847), "the declining years of a corporation are part of its life; * * *. The operation of a going concern is not a condition precedent to tax liability."

These determinations are consistent with the applicable regulations.[2] Treasury Regulations 111, Section 29.22(a)–20 provided:

> When a corporation is dissolved, its affairs are usually wound up by a receiver or trustees in dissolution. The corporate existence is continued for the purpose of liquidating the assets and paying the debts, and such receiver or trustees stand in the stead of the corporation for such purposes.

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[2] The two Regulations quoted are applicable to the year 1949. Treasury Regulations 118, Sections 39.22(a)–20 and 39.52–1(b) are applicable to the year 1953 and Treasury Regulations on Income Tax (1954 Code), Section 1.6012–2(a)(2) are applicable to the year 1954. All three Regulations, as well as their predecessors, are substantially the same.

Section 29.52–1 provided:

> If the corporation has valuable claims for which it will bring suit during this period [following dissolution], it has retained assets, and it continues in existence.

Essentially the same Regulations have been held reasonable constructions of the statutory sections under which they were promulgated. *O'Sullivan Rubber Co.* v. *Commissioner, supra; Northwest Utilities Securities Corp.* v. *Helvering, supra.* Moreover, the repeated reenactment by Congress of the pertinent statutory sections may be considered as legislative approval of Section 29.22(a)–20 of the Regulations, which was first promulgated in 1921 (Treasury Regulations 45 (1920 ed.), Art. 547) and have continued without any material change to the present. *Helvering* v. *Winmill,* 305 U.S. 79, 83; *Helvering* v. *Wilshire Oil Co.,* 308 U.S. 90, 99; *O'Sullivan Rubber Co.* v. *Commissioner, supra,* 120 F. 2d at 847.

The Court of Claims properly applied these Regulations and cases to the relevant facts. The record shows that, at the time of their dissolution, Asphalt and Interocean had as assets awards from the Mixed Claims Commission for their lost vessels, the first payments of which they had already received (Pet. 31–33). These assets were not distributed to the shareholders, but were retained through the years involved by the liquidating trustees for purposes of collection (Pet. 19–20, 37). Moreover, as a result of the successful prosecution of these claims prior to their dissolution, the corporations were in debt to the attor-

neys who represented them. The amount and nature of the satisfaction of this indebtedness were resolved by a compromise court decree in 1931 (Pet. 34–36). The fact that payment of the indebtedness was made contingent upon the corporations' receipt of award payments did not in any way alter the basic fact of the existence of this corporate indebtedness which the liquidating trustees were responsible for satisfying. Interocean also retained two other potential assets, the claims for which the trustees have since "persistently pressed" (Pet. 39). The claim against Great Britain later involved investigation, conferences at the State Department, and referral to outside counsel for evaluation (Pet. 39–40). The claim to property in the Dominican Republic subsequently required testing land for oil and determining title to the property (Pet. 40).

After dissolution, the corporations incurred other debts to attorneys for various legal services, which the trustees have paid (Pet. 36). As late as 1960, the trustees' Statement to Stockholders showed separate disbursements to seven different attorneys or law firms (Pet. 52–54). In addition, since the dissolutions of the two corporations, the trustees have continued (1) to receive payments through the system set up by the compromise decree of 1931, (2) to satisfy the bank fees and trustees' commission, and (3) to pay the balance to the stockholders of Interocean pro rata (Pet. 37).

All these activities of the trustees to secure and collect the assets of the two corporations and satisfy

their liabilities—activities which required the exercise of considerable discretion—support the lower court's conclusion that for federal tax purposes the two corporations remained in existence. These were not dormant or dead corporations which the Commissioner of Internal Revenue attempted to disinter. To the contrary, they remained in continuous existence from the dates of their dissolutions. That this existence continued for a long period of time after the corporations ceased the active conduct of their business certainly does not by itself necessitate, as taxpayer urges (Pet. 16–17), the termination of their taxability as corporations. As long as the liquidating trustees continued to secure and collect assets, pay debts, and make disbursements, the trustees were, in the words of the Regulations, "trustees in dissolution" and the corporations remained in the process of liquidation subject to federal income tax.

Nor is there any merit to taxpayers' contention (Pet. 11) that there is a conflict in the cases which requires resolution by this Court.[5] In each of the three cases on which taxpayers principally rely, the courts specifically found that the corporation involved had distributed all of its assets, had no debts, made no disbursements, and therefore had gone out of existence. Here the corporations, through their liquidating trustees, retained assets, collected payments resulting from them, paid off debts, and made disbursements to stockholders.

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[5] *Gold Metal Process Co.* v. *Commissioner*, 247 F. 2d 864 (C.A. 6); *Commissioner* v. *Henry Hess Co.*, 280 F. 2d 553 (C.A. 9); *Telephone Directory Advertising Co.* v. *United States*, 142 F. Supp. 884 (C. Cls.).

CONCLUSION

For the reasons given, we respectfully submit that the petition for a writ of certiorari should be denied.

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MAY 1963.

APPENDIX

Internal Revenue Code of 1939 (26 U.S.C. (1952 ed.)):

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * * or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property * * * or gains or profits and income derived from any source whatsoever. * * *

* * * * *

SEC. 52. CORPORATION RETURNS.

(a) *Requirement.*—Every corporation subject to taxation under this chapter shall make a return, stating specifically the items of gross income and the deductions and credits allowed by this chapter and such other information for the purpose of carrying out the provisions of this chapter as the Commissioner with the approval of the Secretary may by regulations prescribe. * * * In cases where receivers, trustees in bankruptcy, or assignees are operating the property or business of corporations, such receivers, trustees, or assignees shall make returns for such corporations in the same manner and form as corporations are required to make returns. Any tax due on the basis of such returns made by receivers, trustees, or assignees shall be collected in the same manner as if collected from the corporation of whose business or property they have custody and control.

* * * * *

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 61. GROSS INCOME DEFINED.

(a) *General Definition.*—Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, * * *:

* * * * *

SEC. 6012. PERSONS REQUIRED TO MAKE RETURNS OF INCOME.

* * * * *

(b) *Returns Made by Fiduciaries and Receivers.*—

* * * * *

(3) *Receivers, trustees and assignees for corporations.*—In a case where a receiver, trustee in bankruptcy, or assignee, by order of a court of competent jurisdiction, by operation of law or otherwise, has possession of or holds title to all or substantially all the property or business of a corporation, whether or not such property or business is being operated, such receiver, trustee, or assignee shall make the return of income for such corporation in the same manner and form as corporations are required to make such returns.

* * * * *

Treasury Regulations 111 (1939 Code):

SEC. 29.22(a)-20. *Gross income of corporation in liquidation.*—When a corporation is dissolved, its affairs are usually wound up by a receiver or trustees in dissolution. The corporate existence is continued for the purpose of liquidating the assets and paying the debts, and such receiver or trustees stand in the stead of the corporation for such purposes. * * *

SEC. 29.52-1. *Corporation Returns.*—Every corporation not expressly exempt from tax must make a return of income, regardless of the amount of its net income. * * * A corporation having an existence during any portion of a taxable year is required to make a return.

> If a corporation was not in existence throughout an annual accounting period (either calendar year or fiscal year), the corporation is required to make a return for that fractional part of a year during which it was in existence. A corporation is not in existence after it ceases business and dissolves, retaining no assets, whether or not under State law it may thereafter be treated as continuing as a corporation for certain limited purposes connected with winding up its affairs, such as for the purpose of suing and being sued. If the corporation has valuable claims for which it will bring suit during this period, it has retained assets, and it continues in existence. * * *

The pertinent provisions of Treasury Regulations 118 (1939 Code), Sections 39.22(a)–20 and 39.52–1(b), and Treasury Regulations on Income Tax (1954 Code), Section 1.6012–2(a)(2) are substantially similar to the provisions of Treasury Regulations 111, Sections 29.22(a)–20 and 29.52–1 quoted above.

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